



Union of Concerned Scientists

Citizens and Scientists for Environmental Solutions

July 30, 2008

Cynthia A. Carpenter, Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

**Re: ARBITRARY AND CAPRICIOUS ENFORCEMENT ACTION /
INACTION**

Dear Ms. Carpenter:

Once again, I am baffled by inconsistent enforcement outcomes on two seemingly similar violations. Enforcement action in one case and enforcement inaction in the other cannot be explained by the Nuclear Regulatory Commission's stated enforcement policies, thus leaving arbitrary and capricious as the apparent explanations for this behavior. Even if the inconsistent enforcement outcomes can somehow be argued to be consistent with the NRC's stated enforcement policies, the outcome in one case is unarguably inconsistent with the letter and spirit of said policies.

The two enforcement outcomes are the July 3, 2008, Confirmatory Order¹ issued by the NRC to an individual for an apparent violation of the deliberate misconduct rule for allegedly failing to provide complete and accurate information on an application for unescorted access to the Hatch nuclear plant in Georgia, and the ongoing violation at Indian Point of an NRC Order dated January 31, 2006,² to provide backup power for emergency sirens by January 30, 2007, subsequently relaxed by the NRC to April 15, 2007.³ When the licensee failed to comply with the order, the NRC proposed a \$130,000 civil penalty⁴ and later a \$650,000 civil penalty.⁵

¹ Letter dated July 3, 2008, from Luis A. Reyes, Regional Administrator, Nuclear Regulatory Commission, to Anthony R. Fortuna, IA-07-069, "Confirmatory Order (Effective Immediately) NRC Office of Investigations Report No. 2-2006-035 (Hatch Nuclear Plant)."

² Confirmatory Order Modifying License dated January 31, 2006, by J. E. Dyer, Director – Office of Nuclear Reactor Regulation, Nuclear Regulatory Commission, EA-05-190.

³ Letter dated January 23, 2007, from J. E. Dyer, Director – Office of Nuclear Reactor Regulation, Nuclear Regulatory Commission, to Michael R. Kansler, President – Entergy Nuclear Operations, Inc., EA-05-190, "Relaxation of Implementation Date for NRC Confirmatory Order (EA-05-190) – Emergency Notification System Backup Power for Indian Point Nuclear Generating Units 2 and 3."

⁴ Letter dated April 23, 2007, from Samuel J. Collins, Regional Administrator, Nuclear Regulatory Commission, to Michael R. Kansler, President – Entergy Nuclear Operations, Inc., EA-07-092 and EA-05-190, "Notice of

In the case of the Hatch individual, the NRC concluded that the person withheld information on his application about having tested positive on a drug test administered by a previous employer and the failure to disclose this information prevented the Hatch licensee from considering it when assessing the individual's trustworthiness and reliability as required by 10 CFR 73.56(b). The individual gained unescorted access to the protected area at Hatch from February 16 until March 27, 2006.

The NRC did not establish that this individual's performance at Hatch was impaired by drug use; he would have had to successfully take and pass a drug and alcohol test at Hatch prior to initially entering the protected area with an unescorted access badge. So, drug use was not the issue. The issue that concerned the NRC involved the individual's trustworthiness and reliability for not having disclosed the prior positive drug test. The positive drug test at least raised a question about the individual's trustworthiness and reliability; failure to properly disclose the information on the application for unescorted access privileges reinforced those doubts.

In the Indian Point case, the NRC assembled ample evidence to question the trustworthiness and reliability of individuals at Indian Point yet has not taken the next step, sanctioning those persons as they did the Hatch individual. When NRC denied the licensee's second request for an extension to the order's deadline,⁶ the staff stated:

*As part of the request, Entergy discussed the difficulties encountered in achieving reliable operation in the radio-only activation mode. The NRC staff evaluated the factors presented in the request, as well as Entergy's ability to have reasonably foreseen difficulties which impacted the completion date of April 15, 2007. Additionally, the NRC staff evaluated the extent to which the factors described by Entergy were within its control. **The NRC concludes that these factors were known or should have been known by Entergy at the time the first extension was requested.** Therefore, inasmuch as Entergy has not demonstrated good cause, the NRC denies Entergy's request for a relaxation of the Order. [emphasis added]*

Factors that individuals knew or should have known that caused this licensee to not demonstrate good cause and, as a direct consequence, violate an NRC Order. That would certainly seem to raise doubt about the trustworthiness and reliability of these individuals.

Violation and Proposed Imposition of Civil Penalty - \$130,000 and Additional Requirement to Provide Information – (Indian Point Nuclear Generating Station, Units 3 and 3) (Failure to meet NRC Confirmatory Order (EA-05-190) – Emergency Notification System Backup Power).”

⁵ Letter dated January 24, 2008, from Martin J. Virgilio, Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance Programs, Nuclear Regulatory Commission, to Michel A. Balduzzi, Senior Vice President & COO, Entergy Nuclear Operations, Inc., EA-08-006, “Notice of Violation and Proposed Imposition of Civil Penalty - \$650,000, Indian Point Nuclear Generating Unit Nos. 2 and 3.”

⁶ Letter dated April 13, 2007, from J. E. Dyer, Director – Office of Nuclear Reactor Regulation, Nuclear Regulatory Commission, to Michael R. Kansler, President – Entergy Nuclear Operations, Inc., EA-05-190, “Response to Entergy Letter Regarding NRC Confirmatory Order (EA-05-190) – Emergency Notification System Backup Power for Indian Point Nuclear Generating Units 2 and 3.”

You may recall writing to me about a year ago⁷ seeking to unbaffle me regarding the NRC's unwillingness to apply the "per day" provision of the enforcement policy for the ongoing violation at Indian Point. You pointed out the following:

*On May 23, 2007, **Entergy responded to the NOV and committed to August 24, 2007, as the latest date to declare the new ENS system and its associated backup power supply as operable.** The NRC evaluated Entergy's response to the NOV and the additional information it gathered at the July 9, 2007, public meeting and issued the Order to formalize the commitments in Entergy's NOV response by making them regulatory requirements. [emphasis added]*

I assume that when the licensee missed this second deadline, the NRC applied the second civil penalty (still neglecting to apply the "per day" provision for the ongoing violation).

But does not the repeated failure to honor its own commitments (recall that the January 2006 Order by the NRC was confirmatory in nature because the licensee formally agreed to meet the January 2007 deadline) reinforce doubts about the trustworthiness and reliability of the individuals involved in the wrong-doing? Shouldn't the NRC treat the untrustworthy and unreliable individuals at Indian Point to the same treatment it gave the Hatch individual? Or worse, since the Hatch individual caused that license to violate a regulatory requirement one time while the Indian Point conspirators have notched up at least two violations? Fairness and consistency dictate that the NRC take the same enforcement action for the persons at Indian Point as it did for the person at Hatch.

But even if similar behaviors can somehow be cognitively separated, the fact remains that the NRC's enforcement actions at Indian Point are inconsistent with its stated policies. Rather than risk mischaracterizing NRC's enforcement policies, I quote your words to me from last year's letter:

We, at the NRC, strive to take enforcement actions that are effective under the particular circumstances consistent with our enforcement policy. The primary purpose of our enforcement policy is to support the NRC's overall safety mission in protecting the public health and safety and the environment. Consistent with that purpose, the policy is intended to deter non-compliance and, when non-compliance does occur, encourage the prompt identification and correction of the non-compliance

Yes or no, have NRC's enforcement actions at Indian Point deterred non-compliance and encouraged the prompt correction of the non-compliance? No, not by any stretch of the truth.

Would imposing the allowable civil penalty of \$130,000 per day from April 16, 2007, until such time as the emergency sirens at Indian Point are equipped with an operable backup power source have achieved prompter compliance? Or, would have sanctioning the untrustworthy and unreliable lads at Indian Point a la the Hatch sanction have succeeded? It's hard to speculate. But at least the NRC could not be faulted as essentially an accomplice by administering an enforcement-lite approach to continuing violations of federal requirements.

⁷ Letter dated August 20, 2007, from Cynthia A. Carpenter, Director – Office of Enforcement, to me.

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I see that NRC has scheduled yet another meeting on August 8, 2008, with the Indian Point licensee for yet another status update on the ongoing soap opera that might be called *Lies of Our Lives*. I'm not sure it's worth the time to watch some more NRC finger-shaking and listen to more empty promises from persons of questionable trustworthiness and reliability.

Sincerely,

A handwritten signature in black ink that reads "David A. Lochbaum". The signature is written in a cursive, flowing style.

David Lochbaum
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